From: Doug Siebert
To: Microsoft ATR
Date: 1/9/02 2:39am
Subject: Microsoft Settlement

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I would like to submit my comments on the proposed settlement between the US DOJ and Microsoft. My name is Douglas Siebert, I am an independant consultant who does enterprise computing work, and have been a professional in the field for ten years. I hold a Masters in Computer Science in addition to an MBA from the University of Iowa. I feel that I have a much greater understanding of these matters than most people from a technical perspective, and have been in the field for a long enough time that I know the history behind all the various aspects of the case.

I have followed the case with great interest as I have become more and more concerned over the years about Microsoft's domination of the industry, and its negative effects. The explosive growth of the industry and its resultant effect on the economy has allowed Microsoft's abuses to go on for far too long. I think a lot of people had a "if it ain't broke don't fix it" attitude about this. While I can understand that, I think the industry would even more strong, creative and dynamic if Microsoft did not hold such a totally dominant position over such a large and ever increasing portion of it.

I feel the proposed settlement is totally inadequate. It does not punish Microsoft at all for its past abuses, nor is there any real change put into force to either prevent them from future abuses or make it more attractive financially or legally to avoid these abuses on its own. The US Court of Appeals ruled unanimously that Microsoft is a monopoly, and has stated the remedy for their illegal conduct in maintaining this monopoly must "seek to 'unfetter (the) market from anticompetitive conduct,' ... to 'terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future.'" As it does none of these things, it must be scrapped, and unless a far stronger deal can be struck, I feel the Court must direct the proceedings to continue.

The DOJ has entered into deals with Microsoft before, and the result was a larger and stronger monopoly, with monopoly profits accorded to its top officers as a reward for their illegal and unethical behavior. This remedy will be equally ineffective, with loopholes to strengthen Microsoft's position riddling the terms. As a simple example, the requirement for Microsoft to disclose its APIs allows them an out for anything relating to security (in today's Internet, nearly anything can be determined to be security critical, and if not it can be altered so that it is) It also allows Microsoft to only disclose these APIs to companies whom Microsoft deems as having a "viable business plan". Nevermind possible abuses of this in connection with for-profit companies having financial difficulties, it is an out for them in connection with their only real competition in the operating system market today, so-called "open source" systems such as Linux. Since their works are essentially in the public domain, Microsoft obviously crafted this requirement as a way to prevent giving the critical API information to what they feel is the biggest threat to their current monopoly.

The nine states (including my home state of Iowa) who have intelligently declined to be a part of this one-sided settlement have proposed a somewhat modified version. While better, that version is still missing some key aspects of the picture. The requirement to make source code for Microsoft's Internet Explorer browser will obviously be a deal killer from Microsoft's perspective. The taking of their intellectual property is something the Court is likely to be loathe to do as well. But the worst thing about this is that it wouldn't really do anything substantial as far as changing the competitive landscape. It would certainly be more than a slap on the wrist to Microsoft, and something that may give them pause before they continue on to future abuses of their monopoly, but it is not particulary constructive.

However, I do not wish to simply criticize the settlement. I do have some suggestions for a remedy I'd like to see considered in whole or in part. I have noted my reasoning behind these points as well.

1) Disallow Microsoft from the purchase of or investment in any new

companies. Microsoft has historically used its monopoly profits as a way of extending its monopoly by buying out the competition to kill it or integrate it into their product portfolios. They have lately been using strategic investments with their huge cash reserve to take equity positions in other companies, as a way to push their technology onto these companies when they otherwise would not have freely chosen it.

2) Disallow Microsoft from entering into any new exclusive licensing deals with any companies or individuals for any of their products or intellectual property. This would prevent them from one of their favorite avenues for further abuses, since anything Microsoft licensed would still be available to others to license as well and use to compete fairly with Microsoft in the marketplace.

3) Make all deals, contracts, etc. Microsoft enters into a matter of public record. In addition, any existing deals would have to be entered into the public record within a reasonable period of time after the final judgement is made. This would give Microsoft (or those who have entered into deals or contracts with them) an opportunity to extricate themselves from any deals they would rather not have publicly disclosed for any reason.

4) Require Microsoft to disclose all APIs, network protocols, file formats, etc. for all its software in any market where they have more than 50% share. This would extend to any new markets where they currently don't have 50% share if they achieve it during the lifetime of the settlement's terms. These APIs would be made freely available in the public domain with no restriction on their use. All required information must be available before any product using them is available for retail sale or for preinstallation by its OEM partners. In addition, any changes to these APIs caused by changes to its software due to patches, fixes, service packs and such would also need to be disclosed prior to the release of said fixes. The only exception would be for critical security fixes, due to the timeliness requirement for these fixes, that Microsoft be allowed two weeks after the release of these fixes before disclosure is required.

   This is the biggest change as far as potentially restoring competition to the marketplace. Armed with the ability to interoperate with Microsoft software in a 100% compatible way, competition would spring up in many places, both from commercial competitors as well as "open source" freely available programs. The marketplace could freely choose based on features, price, support, etc. without the current worries that Microsoft will make changes that will render the software inoperable with Microsoft's overnight. Microsoft's huge size and vast army of employees would still give them a sizeable advantage, but if nothing else, having to compete fairly would cause Microsoft to put its resources back towards giving consumers what they want, rather than what Microsoft requires in order to insure the continuation of its monopoly.

   This solution would be far superior to the nine states' solution of forcing Microsoft to put their intellectual property in the public domain (in the form of the source code to their Internet Explorer browser) since it would create competition across the board (end user operating systems, server operating systems, Office suite, Internet browser) rather than possibly only in a narrowly targeted area. It would also avoid setting a precedent the Court would probably rather not set. Microsoft would have a much harder time arguing against the unfairness of a solution that merely puts its competition on the same footing as them versus the taking of their property.

Finally, I would like to suggest that the proposed settlement's terms for the "compliance committee" are woefully inadequate. I do not believe that Microsoft should have any say in the membership of this committee. Instead, Microsoft should be required to provide some of the staffing for this committee so they can expedite the process of locating and securing necessary

documents, information, and access to Microsoft personnel. The committee will have their hands full monitoring Microsoft's compliance, even if they are not deliberately obstructed along the way. Having one committee member coming from Microsoft and another that Microsoft would have to agree on almost guarantees attempted abuses by Microsoft with attempts to obstruct the committee's ability to function effectively in its role.

I want to thank you for allowing me the opportunity to contribute my thoughts on this, and I hope my comments do receive serious consideration. I realize that you will probably receive many thousands of comments on this proposed settlement, and even after discarding those that are incoherent, profane, or obviously cut-and-pasted from prepared propaganda from one side or the other you will still have a large number to read and comprehend. I hope that the time I have taken in investigating this case and collecting and writing my thoughts will be rewarded.

Douglas Siebert
712 Rundell St
Iowa City, IA 52240

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Douglas Siebert
douglas-siebert@uiowa.edu